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IN THE

Supreme Court of the United States

October Term, 1948

No. 52

INGRAM M. STAINBACK, Governor of the Territory of Hawaii, WALTER D. ACKERMAN, JR., Attorney General of the Territory of Hawaii, and W. H. LOPER, Superintendent of Public Instructions of the Territory of Hawaii,
Appellants,

—vs.—

MO HOCK KE LOK PO, an eleemosynary corporation, DAI KUNG CHINESE SCHOOL, an eleemosynary corporation, *et al.*

BRIEF OF THE JAPANESE AMERICAN CITIZENS LEAGUE, *AMICUS CURIAE*

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Interest of Japanese American Citizens League

The Japanese American Citizens League, hereinafter referred to as JACL, as *amicus curiae*, files this brief pursuant to the Court's Rule XXVII(9) and upon the written consent of the parties. JACL is the only national organization representing persons of Japanese ancestry in the United States. Its membership is open to all United States citizens without discrimination as to race, color, creed, or national origin. Its program is best summarized in its slogan: "For Better Americans in a Greater America", and by the slogan of its Anti-Discrimination Committee: "Equal Rights, Equal Opportunities for All". Although the

JACL is primarily concerned with the welfare and problems of persons of Japanese ancestry in this country, it believes that it is appropriate that it express its views upon the fundamental personal and family rights involved in the instant case affecting other minorities as well as persons of Japanese ancestry.

Statement

The essential facts, fully set forth in the briefs of the parties, are that plaintiffs-appellants, three eleemosynary corporations conducting schools in Hawaii for the education of children in the Chinese language, a teacher of the Chinese language, and two individual residents of Hawaii who desired to have their children taught the Chinese language sought to enjoin, as unconstitutional, the enforcement of a Territorial statute regulating the teaching of languages other than English to children under the age of fifteen years. The statute involved (Act 104 of the Hawaiian Legislature, enacted on May 1, 1943) prohibits the teaching of any language other than English in any school, as defined in the statute, to all children under the age of fifteen years who have not passed the fourth grade in public school or its equivalent, and thereafter to children who have not passed in each succeeding grade thru the eighth grade a standard test in English composition and reading with a score not lower than normal for the grade. The District Court, composed of three Judges, determined that the statute in violation of the Fifth Amendment deprives the parents of the ten thousand children above the average in intellectual ability in the first four grades of school in the Territory of Hawaii of their right to have these children taught a language other than English, and deprives the schools and the teacher named in the complaint of their right to teach such children the Chinese language.

ARGUMENT

The statute deprives parents of the fundamental right to have their children taught a language other than English and deprives schools and teachers of their rights to engage in teaching of languages other than English to children in violation of the due process clause of the Fifth Amendment.

The District Court correctly stated that parents have a fundamental right to have their children taught languages other than English, and schools and teachers have the right to pursue the vocation of teaching such languages which are protected by the due process clauses of the Fifth and Fourteenth Amendments. *Farrington* v. *Tokushige*, 273 U. S. 284; *Pierce* v. *Society of Sisters*, 268 U. S. 510; *Bartels* v. *Iowa*, 262 U. S. 404; *Meyer* v. *Nebraska*, 262 U. S. 390.

It is submitted that the District Court correctly held that these judicial precedents require the determination that the present statute violates the due process clause of the Fifth Amendment.

A. *The Statute Unconstitutionally Prohibits and Restricts the Teaching of Languages other than English.*

The statute here in question is at least as objectionable to the Constitution as the former statute of the Territory held unconstitutional in *Farrington* v. *Tokushige*, *supra*. The present statute purports to be based on legislative findings that study of a language other than English retards pupils in their studies carried on in the English language and in many cases causes serious emotional disturbances, conflicts and maladjustments, and that their health

and welfare will be promoted by the statutory prohibition of, and restriction upon, their study of any language other than English. This attempt to justify the statute on such a basis rather than on the basis that it promotes "Americanization" of children, already found inadequate under earlier decisions of this Court, fails utterly to meet the constitutional objection to interference with the fundamental right of parents to have their children taught a language other than English and the right to teach such a language. The constitutional rights involved are too fundamental to be trifled away by such dubious legislative recitals. In *Meyer v. Nebraska, supra*, this Court settled the question in the following language (262 U. S. 390, 401):

> "That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means."

In *Berea College v. Kentucky*, 211 U. S. 45 involving a state statute requiring segregation of races in private educational institutions, Harlan, J., dissenting from the view of the majority of the Court that the only question presented was the narrow one of the right of a corporation to teach classes not segregated by race, correctly stated the fundamental constitutional issue as follows (211 U. S. at 67, 69):

> "The capacity to impart instruction to others is given by the Almighty for beneficient purposes and its use may not be forbidden or interfered with by Government—certainly not, unless such instruction is, in its nature, harmful to the public morals or imperils the public safety. * * * Have we become so inoculated with prejudice of race that the American government, professedly based on the principles of freedom, and charged with protection of all citizens alike, can make distinctions between such citizens in the matter of their voluntary meeting for innocent purposes simply because of their respective races?"

It is submitted that these authorities relied upon by the Court below require the conclusion that the statute involved is a wholly unwarranted and unconstitutional interference with the private teaching of languages other than English.

B. ***The Statute Involved is not Warranted by the Operation of Private Language Schools.***

This wartime statute is an unfortunate and mistaken expression of racism which is particularly regrettable in the Territory where, on the whole, the race relations of the inhabitants of many national origins have exhibited to the world an example of harmony. On the specious grounds of promoting education and health the statute denies to parents, who have the grave responsibility for their children's moral development, the use of a language other than English which may be the best, if not the only, means which the parents have for communicating with and guiding their children in their most formative years.

Even though disloyal activities in connection with the operation of private language schools has been disclaimed as the basis for the legislation, it is nevertheless true that

this wartime statute probably never would have been enacted in 1943 if the mistaken notion were not then current that in some vague and undetermined manner the language schools, particularly Japanese language schools, involved disloyal activity. The report of the Committee on Education of the Senate of the Territory of Hawaii which recommended passage of the bill mentions, without stating any supporting facts, that there was strong reason to believe that the Japanese language schools had been a means of disseminating detrimental propaganda from foreign sources (R. 34). Similarly, as a justification for the evacuation of all persons of Japanese ancestry from the West Coast, some reliance was placed upon the supposedly disloyal activities of Japanese language schools. Dewitt, *Final Report Japanese Evacuation from the West Coast*, 1942, pp. 12-13; *Hirabayashi* v. *United States*, 320 U. S. 81, 97. The utter inadequacy of this ground, as well as the other grounds relied upon, for this hasty and harsh military evacuation undertaken in the confusion of the first months of the war, was completely revealed only upon subsequent study prompted by the extreme exercise of the war power involved in this treatment of one minority of our population.

The Japanese language schools in the United States were first established by Christian missions with the dual purpose of assisting the children born here to learn their parents' tongue, and of assisting the parents to learn English. *Wartime Exile*, United States Department of the Interior, War Relocation Authority (1946) p. 46;[1] *Annals*

[1] "The first Japanese language schools in America were set up by Christian missions. They were established for two purposes: first, to help the newly arrived immigrant learn enough English to make his way in the new country; to help the few children of that early period * * * to learn to read and write their parent's tongue. The first Japanese language school

of the American Academy of Political and Social Science, January 1921, pp. 95-96. Scholarly and scientific examinations of the operation of the Japanese language schools have supported them as socially useful American institutions. H. A. Millis, *The Japanese Problem in the United States* (1915) pp. 265-266; Marian Swinstad, "Attitude of the Japanese Toward Their Language Schools", *Sociology and Social Research*, January-February, 1933, pp. 259-264; Reginald Bell, *Public School Education of Second Generation of Japanese* (1935) pp. 26, 99; E. K. Strong, *The Second Generation Japanese Problem* (1934) p. 205; *cf.* Y. Ichihashi, *The Japanese in the United States* (1932) pp. 329-333. No subversive teachings have been shown in connection with the Japanese language schools. McWilliams, *Prejudice*, pp. 123-124 [cited in *Korematsu* v. *United States*, 323 U. S. 214, 237].

Ironically, although the existence of Japanese language schools was relied on in part as a basis for the military evacuation from the West Coast, individuals of Japanese ancestry who knew the Japanese language were of invaluable assistance to the armed forces of the United States during the war. Although it is not claimed that attendance at these schools produced finished Japanese linguists, it is the experience of the many members of the JACL who attended such schools that such attendance provided a useful foundation in the Japanese language which saved many months in training desperately needed Japanese linguists at such training centers as the Army Japanese language school at Camp Savage, Minnesota. There is ample and unquestioned evidence that United States citizens of Jap-

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in the United States was established in 1887 in San Francisco as a project of the Japanese gospel society. Two years later a Methodist mission [illegible] Japanese started a [illegible] school. [illegible] It was not until 1899 that a Buddhist mission, patterned after the Christian, opened a school in San Francisco."

anese ancestry generally, and the language schools in particular, made important contributions to the successful progress of the war in the Pacific. In *Wartime Exile*, *supra*, it is stated (pp. 49-50):

> "The most telling refutation of the charges made by the West Coast racists against the language schools is to be found in the extensive use made of the graduates of these schools by the Army and Navy in the war against Japan. In the summer of 1942, while the Nisei were still being classified automatically as 4-C (registrants not acceptable for military training and service because of nationality or ancestry) the War Department relaxed its regulations to the extent of accepting qualified Nisei for special assignments. The Intelligence branch of the United States Army periodically sent recruiting officers to the relocation centers to interview and examine candidates. Loyal American citizens of Japanese ancestry were badly needed to teach the fundamentals of the Japanese language to officers of Military Intelligence and also to serve as translators and interpreters. The Kibei, perhaps the most commonly misunderstood group within the Japanese American minority, suspect because they had part or most of their education in Japan, and the Nisei graduates of Japanese language schools in America answered this call and subsequently proved invaluable to the armed forces of the United States, both as instructors in the language schools conducted by Military Intelligence for its officers and as translators and interpreters with the fighting men in the Pacific Theatre. The Navy, while refusing to induct Americans of Japanese ancestry as enlistees, nevertheless used them as civilian instructors in its language school for

intelligence officers at Boulder, Colorado, and later permitted the Marines to borrow Nisei in uniform from the Army to ease progress through enemy-held territory in the Pacific."

In Bradford Smith's *Americans from Japan* (1948), it is stated (pp. 324-326):

"Arthur Komori of Honolulu was in the Philippines with Wainwright. Ordered out before the fall of Bataan, he helped establish ATIS, the Allied Translation and Intelligence Service, which came to have over a thousand Nisei and which translated between two and three million pages of documents. American Nisei were in demand not only by our own forces, but by the British, the Australians, and all our other allies in the Pacific. We were the only ones fortunate enough to have Japanese among our own people. The enemy had no inkling of the extent to which we were able to decipher their messages. Relying on the supposed security of their difficult language, they took inadequate precautions. But even their codes we were able to break.

"General Charles Willoughby, MacArthur's Chief of Staff for Intelligence, says their work shortened the war by two years. Handling top secret information, they uncovered data on the real strength of the Japanese army which led to a complete revision in our plans for ship-building at a saving of billions, and saved a good many men from the draft by a downward revision of the Selective Service program. In Europe they tapped sources revealing the extent of Japanese liaison with the Germans.

"Never before in history, say military officers, did one army know so much about its enemy prior to actual engagement as did the American army throughout most of the Pacific campaign. The Nisei were our secret weapon."

In *I Was an American Spy*, Saturday Evening Post, April 10, 1948, Col. Sidney F. Mashbir, Chief of Staff for Intelligence under General Douglas MacArthur, stated:

"A majority of our translators were American Nisei. Had it not been for the loyalty, bravery, and ability of these Japanese Americans, many phases of intelligence work in the Pacific would have fallen flat. I know that their faithful service to the United States saved many thousands of American lives and shortened the war by months. It must be realized that this group of men had more to lose than any others participating in the war. Had any of them been captured their torture would have been indescribable.

"None of them ever showed the white feather, although ATIS Nisei accompanied assault units on every landing from Papua to the Philippines. More than 150 were finally given direct commissions. The rest were promoted several grades. An exceptionally high percentage were decorated or cited for valor."

Finally, the fact that attendance at Japanese language schools, either in Hawaii or on the mainland, did not in any way adversely affect the loyalty of Americans of Japanese ancestry was dramatically and finally settled not only by their military work as Japanese linguists, but also by their unsurpassed record as combat troops in the European as well as in the Pacific theatre of operations.

The combat record of the Nisei from both Hawaii and the mainland is well known.

The legislative findings cannot conceal the fact that the real motivation for this wartime legislation was race prejudice. Happily the manner in which our American racial minorities served the cause of democracy in the war has completely exposed the lack of any basis for this racial prejudice. In *Korematsu v. United States*, 323 U. S. 214, Justice Murphy in his dissenting opinion stated the constitutional doctrine which outlaws racism as follows (p. 242):

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2 Former Assistant Secretary of War John J. McCloy wrote to the Chairman of the Subcommittee of the Judiciary Committee of the House of Representatives considering a bill to remove the racial discrimination in our naturalization laws in part as follows (Hearings on H. R. 5004, 80th Cong. 2nd Sess. p. 51):

"* * * The record of the Nisei battalions is one of the most spectacular of all our military units. They endured many hard and even bitter campaigns. Their record shows that they won at least as many, if not more, decorations for bravery as any units of the same size in the entire Army.

"In every respect they performed their fullest duty to the country. Their casualties were heavy and I think that their conduct and the conduct of the Japanese-Americans in Hawaii and elsewhere throughout the United States is the strongest evidence one could ask for of their full loyalty to the country."

General Mark W. Clark wrote similarly (*ibid.* p. 52):

"* * * The supreme test of citizenship is the willingness of a man to risk his life so that our country may live.

Under my command in Italy the Four Hundred and Forty-second Infantry Regiment and the One Hundredth Infantry Battalion, composed of nisei, fought the Nazi combat forces with the valor and skill characteristic of the young Americans that they are. * * *

As I recall the outstanding feats of valor in combat of the members of the Four Hundred and Forty-second Infantry and the One Hundredth Infantry Battalion, the number of Purple Hearts awarded to them because of wounds received in battle, and their extremely low hospital rate because of their eagerness to return to the line after having been wounded, I can only urge that the rights of citizenship in our great America be given to the parents who furnished us with such outstanding young manhood, men who willingly gave their all that America could live."

> "All residents of this land are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must accordingly be at all times treated as the heirs of the American experiment and as entitled to all the rights and freedoms guaranteed by the Constitution."

In *Duncan* v. *Kahanamoku*, 327 U. S. 304, Justice Murphy, concurring, stated (p. 334):

> "Racism has no place in our civilization. The Constitution as well as the conscience of mankind disclaims its use for any purpose, military or otherwise. It can only result, as it does in this instance, in striking down individual rights and in aggravating rather than solving the problems toward which it is directed. It renders impotent the ideal of the dignity of the human personality, destroying something of what is noble in our way of life. We must therefore reject it completely whenever it arises in the course of a legal proceeding."

It is submitted that the present statute, actually aimed at the prohibition and restriction of teaching oriental languages, Japanese and Chinese, is an undemocratic, arbitrary and unconstitutional restriction on personal freedom. Such legislation, attempting to stamp out the mother tongues of minority groups, is a mark of autocratic and totalitarian governments which cannot survive the test of our democratic Constitution.

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3 For example, the Imperial Russian and Italian governments at one time prohibited the use of the Polish and German languages in territories acquired by them. "Language", Vol. IX *Encyclopedia of Social Sciences*, p. 167.

CONCLUSION

The judgment appealed from should be affirmed and the statute involved should be held to be an unconstitutional interference with personal freedom in violation of the Fifth Amendment to the Constitution.

Respectfully submitted,

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